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No. 82-708

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION AND CITY OF LOS ANGELES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND AMICI CURIAE BRIEF OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB

In Support of Respondents on Writ of Certiorari to the Supreme Court of California

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The National Audubon Society and the Sierra Club request leave to file the accompanying amici curiae brief in support of respondents State of California ex rel. State Lands Commission and City of Los Angeles.

The National Audubon Society and the Sierra Club appeared below as amici curiae in the proceedings before the California Supreme Court. Respondents State of California and City of Los Angeles have consented to the filing of the accompanying brief. Although the California Land Title Association and the Pacific Legal Foundation, as well as the United States, have filed amicus curiae briefs in support of petitioner Summa Corporation, petitioner has refused to agree to the appearance of the National Audubon Society and the Sierra Club as amici curiae.

I

THE INTEREST OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB IN THIS PROCEEDING

The National Audubon Society is a non-profit New York corporation, founded in 1905, which has more than 450,000 members. The National Audubon Society has a long-standing interest in wildlife, most particularly in birds. The Sierra Club has 350,000 members, 130,000 of whom are concerned California citizens. Residents of the California coast are among the members of both the National Audubon Society and the Sierra Club.

The applicants and their respective membership share a deep concern for the preservation of California's wetland resources and in the protection of the public's interest in and right of access to the tidelands of this state. Wildlife, and birds in particular, are dependent upon wetlands, rivers and lakes for food, nesting grounds, and resting areas. Tidelands also play an important role in the ecology of the ocean, providing an effective natural cleaning mechanism for ocean water and a productive breeding ground for ocean fish. The members of applicants enjoy the undeveloped tidelands of California, including those at issue in this litigation, for hiking, fishing, swimming, bird-watching and scientific study.

Unfortunately, these wetland areas are particularly desirable for development. Approximately 67 percent of California's historic coastal wetlands have been lost statewide, and 90 percent of the historic coastal wetlands in Southern California have been destroyed. *See* Martyn and Bohner,

The Loss of Public Tidelands to Private Parties Through Unconstitutional Land Trades, 13 U.S.F.L. Rev. 39, 41 (1978). The few remaining natural tidal areas are of irreplaceable value.

Ballona Lagoon is of particular interest to applicants, because it is one of the few remaining tideland areas readily accessible to the residents of the Los Angeles metropolitan area. Ballona Lagoon, an estuary in the Marina Del Rey area of the City of Los Angeles, is a major habitat for a variety of waterfowl, including two endangered species, the California Least Tern and the Belding's Savannah Sparrow. The lagoon, of natural origin, is a remnant of an ancient coastal eco-system. (App. 173, 191). Ballona Lagoon has existed in its current form for approximately 1,000 years. (App. 192). The lagoon, although protected from the open sea by a narrow barrier beach, is subject to the tides of the Pacific Ocean. (App. 173). Ballona Lagoon has significant scientific and educational value, and has been used by the public for boating, swimming, fishing, hunting, clamming and bird-watching since the 1800's.

Applicants' interest, however, extends beyond the narrow issue of protecting what remains of Ballona Lagoon, for in this litigation petitioner has taken certain positions that applicants believe would divest California's tidelands of legal protection that has heretofore existed. In the briefs filed with this Court, petitioner, and amici curiae the California Land Title Association and the Pacific Legal Foundation, portray the public trust doctrine applied in this case as an aberration recently developed by the California Supreme Court to destroy private property rights in tidelands.

Applicants are particularly disturbed that the Solicitor General condones this effort. As representatives of the ultimate beneficiaries of the public trust in California and elsewhere, applicants believe their participation in this case would provide a much needed perspective.

II

THE PROPOSED AMICI CURIAE BRIEF

Applicants' proposed brief as amici curiae focuses on a point that has received scant, even scornful, attention from petitioner and amici curiae: The pervasiveness of the deeply-rooted doctrine that tidelands are held in trust by a sovereign for its citizenry.

The California Supreme Court's affirmation of the public trust rights in Ballona Lagoon followed well-established California property law that has received constitutional and statutory confirmation. The importance of public trust rights is shown by the rigorous protection of these rights by numerous other states. The public trust doctrine is also a part of civil law, and under Mexican rule the tidelands of Ballona Lagoon were impressed with a public trust servitude. Control over trust lands is an inherent attribute of sovereignty which the proceedings confirming title to the Rancho La Ballona grant did not extinguish. Instead, that authority passed to California upon its admission. In holding that the tidelands of Ballona Lagoon are subject to the same public trust rights as exist in all other California tidelands, the California Supreme Court did not offend the provisions of the Treaty of Guadalupe Hidalgo nor impair any federal right. Consequently, the lower court's decision should not be disturbed.

III

CONCLUSION

The National Audubon Society and the Sierra Club have often represented those who use and enjoy significant natural resources like Ballona Lagoon in cases such as this. The deep involvement of applicants in this and other California decisions applying the public trust doctrine makes applicants particularly well-qualified to comment upon the decision below. According, the National Audubon Society and the Sierra Club ask leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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AMICI CURIAE BRIEF OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB

THE INTEREST OF THE NATIONAL AUDUBON SOCIETY AND THE SIERRA CLUB

The interest of the National Audubon Society and the Sierra Club is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the California Supreme Court is reported at *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal. 3d 288, 644 P.2d 792 (1982).

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case of respondents.

SUMMARY OF ARGUMENT

Tidelands are a limited, exhaustible resource that uniquely serve public needs for navigation, fishing, and recreation.[1] Contrary to the argument of petitioner and those amici who support petitioner, California's rigorous protection of its coastal resources is not unique. In claiming otherwise, petitioner is asking this Court to turn its back on centuries of law. Tidelands have been granted special legal status since Justinian. England, France and Spain adhered to this tradition. Public trust cases are to be found among the first reported state cases. This Court and the state courts have recognized that a state holds tidelands in trust for its citizenry. The public trust doctrine has long been an integral part of the property law of California. Contrary to petitioner's argument, the public trust doctrine has not suddenly emerged to cloud private property interests.

Given the widespread recognition that tidal areas are *sui generis* and peculiarly subject to public use, it is not surprising that Mexican law applicable in California at the time of cession recognized the public trust. Las Siete Partidas provided "every man can use the sea and its shores . . . for doing everything there which he thinks may be to his advantage." (Las Siete Partidas, CCH (Spain) (1931) pp. 820-821). Neither the Mexican grant to petitioner's predecessors nor the later confirmation proceedings affirming the validity of the grant extinguished those rights of common use. Public trust rights cannot be terminated through silence. Guardianship of trust lands is, like the police power,

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[1] *See generally* Comment, *The Tidelands Trust; Economic Currents in a Traditional Legal Doctrine*, 21 U.C.L.A. L. Rev. 826, 885-890 (1974).

inherent in sovereignty. None of the successive sovereigns explicitly renounced the public trust, and a grant by a government in derogation of its sovereign interest may not be presumed. In fact, both the origiral Mexican grant and the confirmation proceedings expressly reserved servitudes such as the public trust easement. Thus, the tidelands of Ballona Lagoon remain subject to the public trust easement.

The decision of the California Supreme Court confirmed that petitioner has rights in the tidal areas of its property identical to those enjoyed by all other private owners of coastal property in California. This holding neither modifies California real property law, nor disparages federal rights, nor offends the Treaty of Guadalupe Hidalgo. The validity of the original Mexican patent and the confirmation of that patent under the Act of 1851 has not been questioned. Consequently, as petitioner has not claimed a "taking" in the petition for certiorari, no substantial federal question is presented. In the absence of any claimed violation of the United States Constitution, or implication of an overriding federal interest, principles of federalism require that California, like all other states, be free to apply the public trust doctrine as state geography and policy demand.

I

ARGUMENT

THE PUBLIC TRUST DOCTRINE HAS LONG MADE TIDELANDS SUBJECT TO PARAMOUNT PUBLIC RIGHTS

Petitioner Summa Corporation describes the California public trust doctrine as a "court-imposed trust" that the California Supreme Court has recently "vastly expanded" to dislodge petitioner's title to its property. (Petitioner's

Brief at 10, 11, 13). Although the issue was not raised in the petition for certiorari, the California Land Title Association ("CLTA") and the Pacific Law Foundation ("PLF") assert the decision below effected an unconstitutional taking of property, and even suggest other decisions of the California Supreme Court applying the public trust doctrine are similarly infirm. (CTLA Brief at 25-26; PLF Brief at 11-12) Although the United States refrains from contending that the California Supreme Court has violated the Fourteenth Amendment, it similarly contends the California Supreme Court has unsettled established property law by "rediscovering" ancient authorities based on the court's perception of "current policy" in an area that properly belongs to the legislative sphere. (U.S. Brief at 4, 29-30)

The depiction of the public trust doctrine as a recent and aberrational creation of the California Supreme Court is wrong. As is explained in the following section, the public trust doctrine is rooted in America's earliest judicial pronouncements; it has been rigorously observed by all states; and it has been buttressed by well-established California constitutional and statutory provisions.

A. The Public Trust Doctrine Is Widespread and Well-Established In American Law

The public trust doctrine can be traced back through the English common law and Spanish civil law to the Code of Justinian.[3] The significance of this fact is twofold. First,

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[3] *See The Public Trust in Tidal Areas: A Sometimes Submerged Doctrine*, 79 Yale L.J. 762, 763-772 (1970); MacGrady, *The Navigability Concept In The Civil And Common Law: Historic Development, Current Importance, And Some Doctrines That Don't Hold Water*, 3 Fla. St. U.L. Rev. 511, 517 (1975) [hereinafter cited as MacGrady, *The Navigability Concept*].

the persistence of the concept that the public has special, paramount rights in tidelands in a panoply of succeeding legal systems is persuasive testimony of the fundamental importance of these lands to the people of a state or nation. Second, it belies the argument that public rights in tidelands are a mere property interest that may be destroyed through silence or inattention. Instead, the public trust in such lands is governmental, existing by virtue of the sovereignty of a state or nation, and representing a "deeply inherent right" of its citizenry.[3] As this Court has noted,

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.
>
> *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

The various states, although free since *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), to determine rights in the shores and beds of navigable waters according to state law, have uniformly accorded tidelands special status. The universal rule is that the states own these lands subject to a public trust, or "jus publicum", and that any conveyance by the state is subject to the same burden. *See* 1 Clark, *Waters and Water Rights* § 36.4(A), at 196-197 (1967). The public trust doctrine was early established by state courts.[4]

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[3] *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47, 53 (1972). *See also Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455 (1892).

[4] *See Abbot's Ex'r. v. Doe*, 5 Ala. 393 (1843); *Commonwealth v. Inhabitants of Charlestown*, 18 Mass. (1 Pick.) 180 (1822); *Brown v. Chadbourne*, 31 Me. 9 (1849); *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Bell v. Gough*, 23 N.J.L. 624 (1852). *See also Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842).

Although the public trust doctrine applied by the states varies, several common principles can be distilled. First, trust lands may not be alienated into private ownership unless the property will be used to promote public purposes.[5] Second, any alienation of trust property must be express, and will never be presumed.[6] Third, control of public trust lands is a sovereign, or "governmental" interest.[7] Fourth, public trust rights have not been limited to navigation and fishing. Recognized public trust uses include

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[5]*See, e.g., People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 360 N.E.2d 773 (1976); *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725, 735 (1977); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So. 2d 395, 398-399 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973); *Long Sault Development Co. v. Kennedy*, 212 N.Y. 1, 105 N.E. 849, 852 (1914), *error dismissed*, 242 U.S. 272 (1916); *Rhode Island Motor Co. v. City of Providence*, 55 A. 696, 697 (R.I. 1903). *See also Priewe v. Wisconsin State Land Improvement Co.*, 93 Wis. 534, 67 N.W. 918, 922 (1896).

[6]*See, e.g., Gulf Oil Corp v. State Mineral Board*, 317 So. 2d 576, 589 (La. 1974); *Nevada v. Bunkowski*, 88 Nev. 623, 503 P.2d 1231, 1237-1238 (1972); *Hume v. Rogue River Packing Co.*, 51 Or. 241, 92 P. 1065, 1069 (1907); *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497, 499, 501 (1972); *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028, 1033-34 (1940). *See also Robbins v. Dept. of Public Works*, 355 Mass. 328, 244 N.E.2d 577, 580 (1969).

[7]*Illinois Central Railroad v. Illinois*, 146 U.S. 387, 455 (1892). Public trust rights do not depend upon state fee ownership at some point in time, as CLTA argues. Although the federal test of navigability determines which lake and stream beds pass in fee to the states upon statehood, states have recognized public trust rights in waters that are not navigable under the federal test and which therefore have never been held in fee by the state. *See* Johnson and Austin, *Recreational Rights and Titles to Beds on Western Streams*, 7 Nat. Resources J. 1, 7-8 (1967). *See also Brown v. Chadbourne*, 31 Me. 9 (Me. 1849); *Curry v. Hill*, 460 P.2d 933, 935-936 (Okla. 1969); *Luscher v. Reynolds*, 153 Or. 625, 56 P.2d 1158, 1162 (1936); *Diona Shooting Club v. Husting*, 156 Wis. 261, 145 N.W.

swimming, picnicking, boating and other recreational uses.[8] Protection of fish and game habitat, scenic beauty and even eradication of pollution have been held to be within the scope of the public trust. *See Just v. Marinette County*, 56 Wash. 2d 7, 201 N.W.2d 761 (1972); *Township of Grosse Isle v. Dunbar & Sullivan Dredging Co.*, 15 Mich. App. 556, 167 N.W.2d 311 (1969).

Although many of these uses were not recognized under inherited English common law, the increased public appreciation of limited natural resources and demand for recreational opportunities has led to an expansion of the usages protected by the public trust doctrine. *See, e.g., Marks v. Whitney*, 6 Cal. 3d 251, 259-260, 491 P.2d 374, 380 (1971).[9] Petitioner and the CTLA greatly disparage the development of the public trust doctrine. However, the principle that the public has the right to use trust lands for purposes which are peculiar to these resources and for which there is a substantial public demand is part of the animating

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816, 819 (1914). Even in England, the public was granted the right to use nontidal rivers even though the beds were privately owned since the earliest times. 4 Clark, *Waters and Water Rights* §305.1(D), at 104 (1970).

[8] *See, e.g., Southern Idaho Fish & Game Ass'n v. Picabo Livestock Co.*, 96 Idaho 360, 528 P.2d 1295, 1298 (1974); *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 336 N.E. 2d 453, 458 (1975); *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139, 1143 (1893); *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47, 54-55 (1972); *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232, 239 (1969), *cert. denied*, 400 U.S. 878 (1970); *Muench v. Public Service Comm'n*, 261 Wis. 492, 53 N.W.2d 514, 522-23, *aff'd on rehearing*, 261 Wis. 515C, 55 N.W.2d 40, 45-46 (1952).

[9] *See also Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863); *Lamprey v. Metcalf*, 52 Minn. 181, 53 N.W. 1139, 1143-1144 (1893); *Diona Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, 820 (1914).

principle of the trust doctrine. For instance, the public won a right to access to the sea for fishing when this was the area of substantial public demand. *See* 1 Clark, *Waters and Water Rights* § 36.4(B), at 202 (1967). *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 477 (1970). Like other areas of the common law, the public trust doctrine is not static. *Cf. Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842). The development of the public trust doctrine which petitioner protests is no more than an adaptation to meet changing public needs—an adaptation that has been occurring for hundreds of years.

The evolution of the public trust doctrine in California and in numerous other states is no more disruptive of private property rights and private expectations than the concurrent expansion of state zoning and regulation of private property under the police power. Indeed, the development of public trust rights is far less disruptive, since it is restricted to the beds and shores of navigable waters long held to be the object of special public control.[10] The private

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[10] *Cf. Just v. Marinette County*, 56 Wash. 2d 7, 201 N.W.2d 761 (1972) (zoning requiring preservation of lakeshore wetlands covered by the public trust held not to be an unconstitutional taking). *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), cited by CTLA for the proposition that the lower court's decision constituted a taking (CTLA Brief at 27), is inapposite. In that case this Court held the federal navigational servitude gave the public no right of access to a marina that petitioner had spent millions of dollars to create, and that, without compensation, the public could not enjoy the benefits of petitioner's improvements. In this case, no private improvements are being converted to public use, for petitioner has not improved the lands at issue. Further, public rights exist not because of improvements to Ballona Lagoon, but by virtue of the character of Ballona Lagoon in its natural and unchanged state.

property rights of petitioner have no deeper roots than public trust rights. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908); *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960). The claim of petitioner and those writing in its support that the lower court worked a sudden reversal in well-established property law ignores the restraints long imposed on all such property in California, which are explained below.

B. Protection of Public Trust Rights Is Deeply Rooted In California Real Property Law as Well as In the California Constitution, and Is a Fundamental State Policy

From California's admission, its courts have also recognized the public trust in navigable waters and tidelands. As early as 1867 the California Supreme Court observed that tidelands are:

> . . . held by the State in trust and for the benefit of the people. The right of the State is subservient to the public rights of navigation and fishery, and theoretically, at least, the State can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them *her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned.*

Ward v. Mulford, 32 Cal. 365, 372 (1867) (emphasis added).[11]

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[11] *See also Eldridge v. Cowell*, 4 Cal. 80, 87 (1854); *Guy v. Hermance*, 5 Cal. 73, 74 (1855). In both these cases the Court observed that tidelands conveyed into private ownership and reclaimed were subject to an action by the state for purpesture to remove the private encroachment upon the public trust rights.

The sources of this public easement are "the law of nations, and the common and civil law." *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854). Although these cases and others recognized the right of the legislature to convey trust property into private ownership, such conveyance had to be explicit and in furtherance of trust purposes. *Kimball v. MacPherson*, 46 Cal. 103, 108 (1873); *Taylor v. Underhill*, 40 Cal. 471, 473 (1871). Thus, the proposition that public trust rights are retained in trust property conveyed into private ownership, described as "well established" in 1913, is rooted in the earliest decisions of the California Supreme Court. *See People ex rel. Webb v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79 (1913).

The public trust doctrine attained constitutional expression in 1879. What is now article 10, section 4 of the California Constitution provides:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.[12]

Present article 10, section 3 of the California Constitution prohibits the grant or sale of tidelands within two

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[12]This provision, although not separately addressed in the decision below, was raised and provides an adequate and independent basis for the lower court's decision.

miles of any incorporated city or town. In 1909, the California legislature prohibited the sale of tidelands and submerged lands entirely. Cal. Pub. Res. Code § 7991 (Deering 1976). Recent statutes similarly affirm the state's interest in preserving the public's right to use tidelands.[13] Administration of the state's authority in tidelands and submerged lands is vested in respondent State Lands Commission. Cal. Pub. Res. Code § 6301 (Deering 1976).

These constitutional and statutory provisions establish that protection of California tidelands and preservation of public trust rights is a fundamental, long-established policy of the state which California courts must observe and enforce. *See Dietz v. King,* 2 Cal. 3d 29, 42, 465 P.2d 50 (1910). As is next discussed, the Ballona Lagoon tidelands were under Mexican rule impressed with a public trust that the confirmation proceedings under the Act of 1851 did not extinguish. Consequently, the California Supreme Court had the authority and, under the California Constitution, the obligation to protect public trust rights in Ballona Lagoon.[14]

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[13]*See, e.g.*, Cal. Civ. Code § 830 (Deering 1971) (creating a presumption in favor of public ownership of land between high and low tide); Cal. Gov't Code §§ 54090-54093; (Deering 1974 and 1983 Supp.) (beach access); Cal. Pub. Res. Code §§ 6008, 6210.4, 6323, 27001 (Deering 1976 and 1983 Supp.).

[14]CTLA's claim that the lower court's decision subjects all property within a former Mexican land grant to every public right recognized under Mexican law is unfounded. In 1850 California adopted English common law as its rule of decision. Cal. Civ. Code § 22.2 (Deering 1971). No Mexican public rights inconsistent with common law public rights can be recognized by California Courts. *See Lux v. Haggin,* 69 Cal. 255, 384, 10 P. 674 (1886).

II

THE TIDELANDS OF BALLONA LAGOON WERE IMPRESSED WITH A PUBLIC TRUST EASEMENT UNDER MEXICAN RULE AND THE PUBLIC TRUST WAS NOT EXTINGUISHED BY THE CONFIRMATION PROCEEDINGS

A. Under Mexican Law Prior to Cession, Private Land Grants Were Subject to Public Trust Rights

Under the Civil Law, from the Institutes of Justinian until the present time, the seashore has been common property. *Humble Oil & Refining Co. v. Sun Oil Company,* 190 F.2d 191, 194 (5th Cir. 1951), *cert. denied,* 342 U.S. 920 (1952). Las Siete Partidas, the law of highest authority in effect while California was a part of Mexico, was heir to this long tradition. It provided:

> The things which belong in common to all the living creatures of this world are the air, rain, water, and the seas and its shores; for every living creature may use them according to his wants. And therefore every man may enjoy the use of the sea and its shores, either for the purpose of fishing or navigation or doing there whatever else he may conceive advantageous to him.
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> Las Siete Partidas, Title 28, Law 3, CCH (Spain) (1931) pp. 820-821; App. at 20.

Some authorities have interpreted the language of Las Siete Partidas to prohibit any alienation of tidal areas. The Supreme Court of Texas has declared that under Mexican law the bottoms and shores of a tidal lagoon were held by Mexico and did not pass to its grantee. *Luttes v. State,* 159 Tex. 500, 324 S.W.2d 167, 169 (1958). Louisiana,

whose civil code is derived from Las Siete Partidas as well as other civil law sources, has held that property designated common, such as the sea and its shores, is neither alienable nor susceptible of private ownership. *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974). *See also New Orleans Land Co. v. Board of Levee Commissioners*, 171 La. 718, 132 So. 121 (1930), *aff'd*, 283 U.S. 809 (1931) (title claimed under French and Spanish grants did not include lake bed, which is unsusceptible of private ownership).

However, even if the language of Las Siete Partidas is not interpreted so broadly, it nevertheless provides at least for a kind of property incapable of exclusive ownership. This concept is virtually identical to the public trust doctrine as it has evolved in the United States.[11] Indeed, with respect to river banks, Law 6 of Las Siete Partidas, part 3, title 28, expressly provided that although river banks may be privately owned, "nevertheless, every man has a right to use them . . . ." App. 199-200. Since the public rights in seashores were, if anything, expounded in stronger terms than public rights in river banks, the conclusion follows that if tidal areas were included within a Mexican grant, the right of every person to "enjoy the use of the sea and its shores" would remain unimpaired.

The California Supreme Court is not alone in reaching this conclusion. In *Apalachicola Land & Development Co. v. McRae*, 86 Fla. 393, 98 So. 505, 518 (1923), *error dismissed*, 269 U.S. 531 (1925), the Florida Supreme Court

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[11] *See* MacCready, *The Navigability Concept*, *supra*, at 539; *California Beach Access: The Mexican Law And The Public Trust*, 2 Ecology L.Q. 571, 604 (1972). *See also Lux v. Haggin*, 69 Cal. 255, 315-317, 10 P. 674 (1886).

concluded that under Las Siete Partidas, a grant of submerged lands and tidelands to private persons "would not exclude the public use of the lands and water and the natural products thereof."

An early California decision, albeit in dicta, similarly indicated private Mexican grants were subject to retained public rights. In *Ward v. Mulford*, 32 Cal. 365, 372 (1867), the California Supreme Court pointedly observed that despite its holding a state patentee had acquired no interest in tidelands subject to a previous Mexican grant, "we do not desire to be understood as holding that the Mexican Government, or this State, has the same power of absolute alienation over lands held in virtue of their sovereignty which they have over other lands." 32 Cal. at 372. Instead, grantees took title to "sovereign" property such as tidelands subject to public trust rights. In *Lux v. Haggin*, 69 Cal. 255, 316, 10 P. 674 (1886), the California Supreme Court again noted that under Mexican law "[t]he shores of the sea pertain . . . as to use to all." Thus, the lower court's conclusion that tidelands within Mexican land grants were, prior to cession, impressed with public trust rights fully conforms with precedent and accurately applies Mexican law.[16]

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[16] *Jover v. Insular Government*, 221 U.S. 623 (1911), confirming a grant of tidelands in the Philippines, is not to the contrary. *Jover* was concerned only with the validity of the original grant; the retention of public trust rights in the grant was not discussed. Nor does the reclamation of portions of the *Jover* grant somehow imply that under Spanish law the public trust always terminated when the land passed into private ownership. In sharp contrast to the Rancho La Ballena patent, the colonial decree awarding the *Jover* tidelands expressly authorized reclamation, and did so based on specific findings that such reclamation would not interfere with other public purposes and would promote maritime commerce. The decree even restricted the location of the fill. Improvement of dis-

B. The Confirmation of the Mexican Grant Did Not Destroy Public Trust Rights In the Ballona Lagoon Tidelands

The confirmation proceedings under the Act of March 3, 1851 did not extinguish the public trust easements in the tidelands of Rancho Ballona. Under the Treaty of Guadalupe Hidalgo, the United States was obligated to "inviolably respect" the private property rights granted by Mexico to its citizens and ensure that Mexican grantees "enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States." 9 Stat. 922, 929, Art. 8; App. B-1, p. A-26. The purpose of the confirmation proceedings under the Act of March 3, 1851 was to fulfill this obligation.

Petitioner argues that even if the original Mexican land grant was subject to a public trust easement under Mexican law, the public trust rights did not survive the confirmation proceedings under the Act of 1851 because these public rights were not presented to the Board of Land Commissioners or expressly preserved. This argument is wrong on several counts. First, the decree of confirmation issued by the Board of Land Commissioners and the United States District Court decision affirming the decree incorporated the language of the Mexican

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crete areas of tidelands pursuant to explicit authority and for public purposes such as harbor development is permissible under the public trust doctrine. *See, e.g., City of Long Beach* v. *Mansell*, 3 Cal. 3d 462, 484, 476 P.2d 423 (1970). At most, *Jover* indicates this rule was part of Spanish public trust law; it cannot be inferred from *Jover* that public trust rights could be terminated absent such express authority. *Cf. Brickell* v. *Trammel*, 77 Fla. 544, 82 So. 221, 229 (1919). (Except under special circumstances private ownership under Spanish civil law extends only to high-water mark.)

grant reserving "traversing roads and servitudes". Second, this Court has held that such public trust rights are not within the limited jurisdiction of the Board of Land Commissioners or affected by the confirmation proceedings. Third, even if the confirmation decrees had omitted the reservation for servitudes, silence does not suffice to terminate public trust rights.

The Mexican grant of Rancho La Ballona contained the following reservation: "[the grantees] may enclose it without prejudice to the traversing roads and servitudes. . . ." App. A-1, P. A-9. Under Mexican law, this reservation is "an expression of art" through which the "rights of the public are saved in the conveyance of large tracts by the authorities." (R.T. 1085) Since the rights of common usage of Las Siete Partidas were considered servitudes (R.T. 1084), public rights to use the tidelands and submerged lands of Ballona Lagoon were expressly preserved in the Mexican grant.[17]

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[17] *United States v. Coronado Beach Co.*, 255 U.S. 452 (1921), and *Barker v. Harvey*, 181 U.S. 481 (1901), do not establish that this reservation excludes a public servitude over tidelands, as the United States contends. In *Coronado Beach Co.*, the United States argued the reservation embraced a provision of Mexican law authorizing the government to make use of any portion of certain lands for the construction of public buildings. The Court merely concluded that the statutory right did not apply to the lands granted to defendant, a Mexican citizen, but only to lands conveyed to "colonists and foreigners". 255 U.S. at 486. In *Barker*, the Court concluded the reservation, although "sometimes used to express all kinds of servitudes, including therein a paramount right of occupation", did not under the circumstances of the case include an Indian right of occupancy. The Indians had abandoned their claim prior to cession and this abandonment had been recognized by the Mexican authorities, and was reflected in the Mexican grants. 181 U.S. at 488-489.

In addition, the Board of Land Commissioners established by the 1851 Act had only authority to determine the validity and boundaries of the prior Mexican land grants. The Board had no jurisdiction to assess the nature and quality of the fee title or whether it was impressed with any public trust or sovereign interest. In *Fremont v. United States,* 58 U.S. (17 How.) 541 (1854), this Court held the ownership of mineral rights in a Mexican grant was not within the jurisdiction of Board of Land Commissioners under the Act of 1851. Consequently, in an appeal from a decree of the Board of Commissioners:

> The only question before the court is the validity of the title. And whether there be any mines on this land, and if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the Act of 1851.
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> 58 U.S. (17 How.) at 565.

In *Townsend v. Greeley,* 72 U.S. (5 Wall.) 326 (1867), this Court again held the Board of Land Commissioners had only limited jurisdiction. At issue was whether confirmation of San Francisco's legal title had altered or extinguished the trust in which San Francisco had, under Mexican law, held the land for its inhabitants. This Court concluded that the question of whether the legal title confirmed by the Board and the reviewing courts was "charged with any trust, was not a matter upon which either board or court was called upon to pass." Thus, if the land was held subject to any trust under Mexican law, "the trust was not discharged by the confirmation and the subsequent patent." 72 U.S. (5 Wall.) at 335.

In similar proceedings under the Louisiana Land Claims Acts, this Court held that lands impressed with a public trust under a former sovereign remain subject to that trust after its cession, even though the public rights had been presented to and rejected by a confirmatory board similar to the Board of Land Commissioners.[18] *New Orleans v. United States,* 35 U.S. (10 Pet.) 662 (1836). These cases establish that the confirmation proceedings determined private, proprietary rights under a Mexican land grant, but did not affect sovereign or public trust rights.

Finally, no sovereignty, neither Mexico nor the United States nor California, has ever acted expressly to modify or extinguish the public trust servitude in Ballona Lagoon which existed under Mexican law. In the absence of such an act, conveyances of title to tidelands and submerged lands are subject to a retained public trust easement. *See, e.g., Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892); *Swan Island Club, Inc. v. Yarbrough,* 209 F.2d 698, 702 (4th Cir. 1954); *City of Berkeley v. Superior Court,* 26 Cal. 3d 515, 525, *cert. denied,* 449 U.S. 840 (1980). Further, a grant from a sovereign conveys only what has been "specifically and unequivocally delineated and nothing more." *United States v. 1,078.27 Acres of Land,* 446 F.2d 1030, 1038-39 (5th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972).[19] A grant in derogation of sovereignty must be

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[18] In *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.,* 690 F.2d 1157, 1169 (5th Cir. 1982), the court described the Act of March 3, 1851, 9 Stat. 631, as being "very similar" to the Louisiana Land Claims Acts discussed in *New Orleans v. United States.*

[19] *Accord Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604 617 (1978); *Great Northern Railway v. United States,* 315 U.S. 262, 272 (1942); *Walton v. United States,* 415 F.2d 121, 123 (10th Cir. 1969).

strictly construed in favor of the sovereign and the rights of its citizens. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837); *United States v. 2,899.17 Acres of Land*, 269 F. Supp. 903, 909 (M.D. Fla. 1967). This rule is particularly applicable to public trust rights. *Massachusetts v. New York*, 271 U.S. 65, 89 (1926).[20]

Petitioner's argument must founder on the fact that all three sovereigns, Mexico, the United States and California, impress lands within their control with public trust duties. Nowhere does petitioner explain how it comes to be that lands held by Mexico (which, in Las Siete Partidas, impressed tidelands with a public trust), transferred by the United States (which also recognizes the public trust), and held by California (with a long-established body of public trust care), emerged from this process free of the public trust.[21] Inasmuch as the original Mexican grant expressly preserved public trust rights, the limited jurisdiction of the Board of Land Commissioners did not encompass public trust questions, and no sovereign explicitly terminated the public trust, the Ballona Lagoon tidelands remain subject to the public trust.

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[20] *See also United States v. Holt State Bank*, 270 U.S. 49 (1926); *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioner*, 168 U.S. 346, 372 (1897); *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640, 648 (1893).

[21] *Cf. Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 118 (1926) (holding that the title of a riparian owner to a stream bed was impressed with public trust rights irrespective of whether title was derived from the state or from the United States); *Luscher v. Reynolds*, 153 Or. 625, 56 P.2d 1158, 1161-1162 (1936) (although grant by United States conveyed bed of lake not navigable by federal test, title to the lake bed was subject to the superior right of the public for commercial and recreational uses).

III

STATE LAW GOVERNS WHETHER THE BALLONA LAGOON TIDELANDS ARE SUBJECT TO THE PUBLIC TRUST

The existence of a public trust easement in the tidelands of petitioner's property should be determined by state, not federal law. The validity of the confirmation patent has not been challenged, nor does the state dispute that petitioner holds in fee the land within the boundary established by that patent. The only issue is the nature and extent of petitioner's property rights under the patent issued by the United States in confirmation of the prior Mexican grant. Such a dispute does not raise a federal question. *Los Angeles Farming & Milling Co. v. Los Angeles,* 217 U.S. 217 (1910); *Devine v. Los Angeles,* 202 U.S. 313 (1906); *Hooker v. Los Angeles,* 188 U.S. 314 (1903); *Hyman v. State Lands Commission,* 543 F. Supp. 118, 121 (C.D. Cal. 1982), *appeal pending.* The lower court's interpretation of Mexican law as applied to land title in California is controlling. *Los Angeles Farming & Milling Co. v. Los Angeles,* 217 U.S. at 227; *Luttes v. State,* 159 Tex. 500, 324 S.W.2d 167, 186 (1958).[22] A confirmatory patent does not create federal rights or title subject to interpretation under federal law. *Boquillas Land & Cattle Co. v. Curtis,* 213 U.S. 339, 344 (1909). Nor does the equal-footing doctrine require application of federal common law. *Oregon ex rel. State Land*

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[22]*Cf. Hardin v. Jordan,* 140 U.S. 371, 384 (1891) (United States grants bounded on streams and lakes are to be construed, as to their effect, according to state law); *Nevada v. Bunkowski,* 88 Nev. 623, 503 P.2d 1231, 1236-1237 (1972) (prestatehood federal patent; same).

Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1977).

As this Court has observed, "[u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several states." *Id.* at 378. The public trust doctrine "is of great public importance" to the citizens of California. *Marks v. Whitney*, 6 Cal. 3d 251, 257, 491 P.2d 374 (1971). Petitioner has not presented this Court with a claim that the lower court's decision effected a "taking." The tangential federal rights claimed by petitioner through the confirmation proceedings have already been held by this Court not to present a substantial federal question. Although the United States may disagree with California's choice to protect her significant remaining tidelands and preserve the public's right of access to them, that choice is California's prerogative. *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). Nothing in this case invites federal interference with that policy.

IV

CONCLUSION

The fundamental purpose of Article VIII of the Treaty of Guadalupe Hidalgo was to guarantee to the citizens of Mexico the same protection of their property rights as extended to the citizens of the United States. *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 558 (5th Cir. 1946), *cert. denied*, 331 U.S. 808 (1947). Petitioner argues for property rights greater than those enjoyed by all other owners of land on the California coast, who, by accident of history, cannot trace their title back to a Mexican grant. Since 1879 the California Constitution has made access to tidelands a public right. In holding that the tidal areas of

petitioner's property are also impressed with this public trust, the California Supreme Court worked no revolution in property rights but merely confirmed what should long have been apparent to petitioner. Its decision should not be disturbed.

Respectfully submitted,

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